

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

74-2115

To be argued by
EUGENE F. BANNIGAN

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 74-2115

UNITED STATES OF AMERICA,

Appellee,

—v.—

ISMAEL RIVERA, a/k/a "PEQUILINO,"

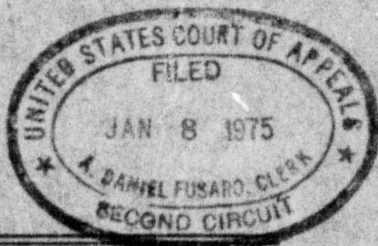
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

EUGENE F. BANNIGAN,
RUDOLPH W. GIULIANI,
JOHN D. GORDAN, III,
*Assistant United States Attorneys,
Of Counsel.*



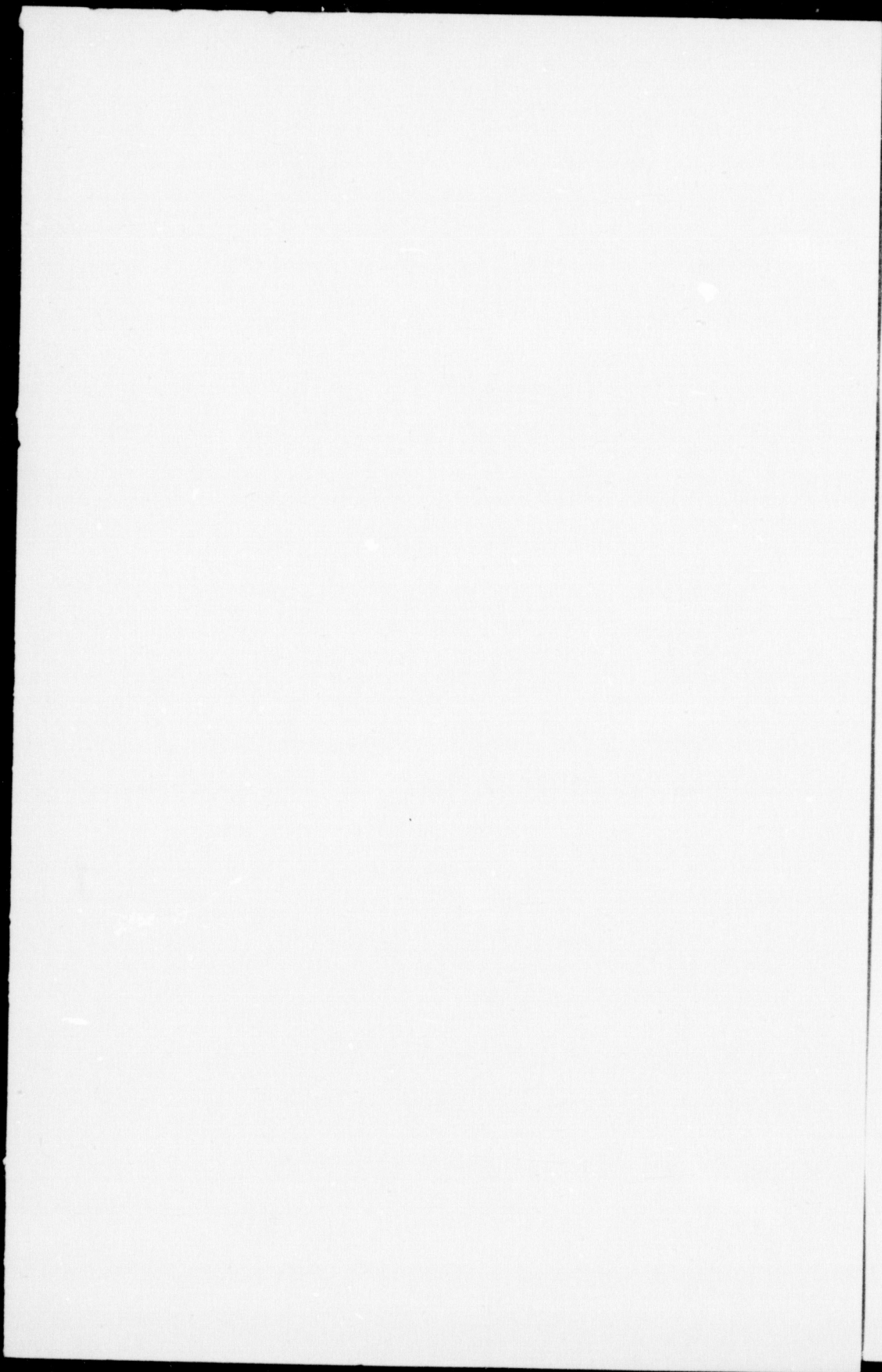


TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	2
A. The Government's Case	2
1. Summary	2
2. The Negotiations	2
3. The Attempted Robbery and Shooting	7
4. Rivera's Escape	8
5. Rivera's Arrest	13
B. The Defense Case	14
C. Government's Rebuttal Case	21
ARGUMENT:	
POINT I—The evidence was more than sufficient to establish Rivera's guilt beyond a reasonable doubt	22
POINT II—The Trial Court's admission of a witness' prior grand jury testimony for its truth, after that witness disowned that testimony, and his allow- ing extrinsic proof of that same witness' motive for retracting were proper evidentiary rulings	28
(A) Vigo's Grand Jury Testimony	28
(B) Evidence of Bias	30
POINT III—Rivera's remaining contentions are with- out merit	32
A. CX 8	32
B. Artemio Rosa, a/k/a "Ardemeo Gonzalez"	33
CONCLUSION	36

TABLE OF CASES

	PAGE
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963)	33, 35, 36
<i>Giglio v. United States</i> , 405 U.S. 150 (1972)	36
<i>Glasser v. United States</i> , 315 U.S. 60 (1942)	23
<i>Marcoux v. United States</i> , 405 F.2d 719 (9th Cir. 1968)	27
<i>Moore v. Illinois</i> , 408 U.S. 786 (1972)	36
<i>United States v. Alberti</i> , 470 F.2d 878 (2d Cir. 1972), cert. denied, 411 U.S. 919 (1973)	27
<i>United States v. Ayala</i> , 307 F.2d 574 (2d Cir. 1962)	27
<i>United States v. Baker</i> , 419 F.2d 83 (2d Cir. 1969), cert. denied, 397 U.S. 976 (1970)	26
<i>United States v. Barrera</i> , 486 F.2d 333 (2d Cir. 1973), cert. denied, 416 U.S. 940 (1974)	27
<i>United States v. Berger</i> , 433 F.2d 680 (2d Cir. 1970), cert. denied, 401 U.S. 962 (1971)	32
<i>United States v. Borelli</i> , 336 F.2d 376 (2d Cir. 1964), cert. denied, 379 U.S. 960 (1965)	29
<i>United States v. Briggs</i> , 457 F.2d 908 (2d Cir.), cert. denied, 409 U.S. 986 (1972)	31, 32
<i>United States v. Burket</i> , 480 F.2d 368 (2d Cir. 1973)....	33
<i>United States v. Cirillo</i> , 468 F.2d 1233 (2d Cir. 1972), cert. denied, 410 U.S. 989 (1973)	27, 31
<i>United States v. Cunningham</i> , 446 F.2d 194 (2d Cir.), cert. denied, 404 U.S. 950 (1971)	29
<i>United States v. D'Amato</i> , 493 F.2d 359 (2d Cir. 1974), cert. denied, 43 U.S.L.W. 3208 (October 9, 1974)	26
<i>United States v. DeAlesandro</i> , 361 F.2d 694 (2d Cir.), cert. denied, 385 U.S. 842 (1966)	27

	PAGE
<i>United States v. DeSisto</i> , 329 F.2d 929 (2d Cir.), <i>cert. denied</i> , 377 U.S. 979 (1964)	29
<i>United States v. Franzese</i> , 392 F.2d 954 (2d Cir. 1968)	32
<i>United States v. Garelle</i> , 438 F.2d 366 (2d Cir. 1970), <i>cert. dismissed</i> , 401 U.S. 967 (1971)	27
<i>United States v. Graham</i> , 102 F.2d 436 (2d Cir.), <i>cert. denied</i> , 307 U.S. 643 (1939)	31
<i>United States v. Gugliaro</i> , 501 F.2d 68 (2d Cir. 1974)	36
<i>United States v. Indiviglio</i> , 352 F.2d 276 (2d Cir. 1965) (<i>en banc</i>), <i>cert. denied</i> , 383 U.S. 907 (1966)	29
<i>United States v. Insana</i> , 423 F.2d 1165 (2d Cir.), <i>cert. denied</i> , 400 U.S. 841 (1970)	29
<i>United States v. Klein</i> , 488 F.2d 481 (2d Cir. 1973)	29
<i>United States v. Lester</i> , 248 F.2d 329 (2d Cir. 1957)	31
<i>United States v. Marrapese</i> , 486 F.2d 918 (2d Cir. 1973), <i>cert. denied</i> , 415 U.S. 994 (1974)	26
<i>United States v. Malizia</i> , 503 F.2d 578 (2d Cir. 1974)	27, 31
<i>United States v. McCarthy</i> , 473 F.2d 300 (2d Cir. 1972)	23
<i>United States v. McConnery</i> , 329 F.2d 467 (2d Cir. 1964)	27
<i>United States v. Mingoia</i> , 424 F.2d 710 (2d Cir. 1970)	29
<i>United States v. Nuccio</i> , 373 F.2d 168 (2d Cir. 1967), <i>cert. denied</i> , 392 U.S. 930 (1968)	29
<i>United States v. Pacelli</i> , 470 F.2d 67 (2d Cir. 1972), <i>cert. denied</i> , 410 U.S. 983 (1973)	30
<i>United States v. Peichev</i> , 500 F.2d 917 (9th Cir. 1974)	27
<i>United States v. Pfingst</i> , 477 F.2d 177 (2d Cir.), <i>cert. denied</i> , 412 U.S. 941 (1973)	29

<i>United States v. Pui Kan Lam</i> , 483 F.2d 1202 (2d Cir. 1973), <i>cert. denied</i> , 415 U.S. 984 (1974)	27
<i>United States v. Rizzuto</i> , 504 F.2d 419 (2d Cir. 1974)	26
<i>United States v. Ruggiero</i> , 472 F.2d 599 (2d Cir.), <i>cert. denied</i> , 412 U.S. 939 (1973)	35
<i>United States v. Scanfidia</i> , 390 F.2d 244 (2d Cir. 1968), <i>vacated on other grounds</i> , 394 U.S. 310 (1969)	32
<i>United States v. Smolin</i> , 182 F.2d 782 (2d Cir. 1950)	27
<i>United States v. Waldman</i> , 240 F.2d 449 (2d Cir. 1957)	27
<i>United States v. Wisniewski</i> , 478 F.2d 274 (2d Cir. 1973)	27
<i>United States v. Wright</i> , 466 F.2d 1256 (2d Cir. 1972), <i>cert. denied</i> , 410 U.S. 916 (1973)	26
<i>Williams v. United States</i> , 503 F.2d 995 (2d Cir. 1974)	35

OTHER AUTHORITIES

McCormick, Evidence § 40 (2d ed., 1972)	31
Wigmore, Evidence § 948 (Chadbourn rev. 1970)	31

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 74-2115

UNITED STATES OF AMERICA,

Appellee,

—v.—

ISMAEL RIVERA, a/k/a "Pequilino,"

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Ismael Rivera, a/k/a "Pequilino" appeals from a judgment of conviction entered on August 16, 1974, in the United States District Court for the Southern District of New York, after a nine-day trial before the Honorable Inzer B. Wyatt, United States District Judge, and a jury.

Indictment 74 Cr. 280, in three counts, was filed on March 21, 1974. Count One charged Rivera with the first degree murder of Special Agent Frank Tummillio of the Bureau of Narcotics and Dangerous Drugs, Title 18, United States Code, Sections 1111, 1114 and 2. Count Two charged Rivera with wounding Special Agent Thomas Devine of the Bureau of Narcotics and Dangerous Drugs during an attempted robbery of moneys and property of the United States, Title 18, United States Code, Sections 2114 and 2.

Count Three charged Rivera with assaulting a federal agent with a deadly weapon, Title 18, United States Code, Sections 1111, 1114 and 2.

Rivera was first tried before the Honorable Whitman Knapp, United States District Judge, and a jury from April 1 to April 17, 1974. A mistrial was declared on April 17, 1974 when the jury was unable to agree upon a verdict. Rivera's second trial commenced before Judge Wyatt on June 10, 1974 and ended on June 21, 1974, when the jury returned guilty verdicts on all counts.

On August 16, 1974, Judge Wyatt sentenced Rivera to life imprisonment on Count One, to run consecutively with concurrent terms of imprisonment of 25 and 10 years imposed on Counts Two and Three, respectively.

Rivera is presently serving his sentence.

Statement of Facts

A. The Government's Case

1. Summary

On October 12, 1972, Jose Nieves and Jose Matta shot and killed Special Agent Frank Tummillio and wounded Group Supervisor Thomas Devine of the Bureau of Narcotics and Dangerous Drugs during an attempted robbery. At the trial below the Government's proof established that Ismael Rivera joined with Nieves and Matta in their illegal venture to rob the agents and aided and abetted them in the attempted robbery.

2. The Negotiations

In the latter part of September or early October, 1972, Mabel Salvatierra, an informant for the Bureau of Narcotics and Dangerous Drugs, began negotiations with Jose Nieves

for the sale of 10 kilograms of cocaine for \$160,000 to her "customers" Frank Tummillo and Jeffrey Hall, Special Agents who were acting in an undercover capacity. Apparently as a result of these overtures, Nieves contacted Robert Vigo and asked him to supply 10 kilograms of cocaine, which Nieves said he needed for a customer. Robert Vigo agreed to obtain the cocaine and to supply partial financing for the purchase, provided Nieves furnished some of the purchase money and paid Vigo a \$20,000 commission.

Over the course of the succeeding three weeks, Nieves, accompanied by the defendant Ismael Rivera, a/k/a "Pequilino", Jose Matta and a number of other unidentified individuals, kept urging Vigo to obtain the cocaine. During these meetings, Nieves and Rivera continually assured Vigo that he would receive his commission once the transaction with Nieves' customer was consummated. During the first or second week of October, 1972, the negotiations with Robert Vigo collapsed because Nieves never supplied his share of the purchase money, and also because Vigo became "leery" of Nieves and Rivera (Tr. 179, 396-399, 827-834).*

Having failed in their attempt to obtain the narcotics for the potential customers, Hall and Tummillo, Nieves and Rivera now decided they would play out the negotiations, pretend to be supplying narcotics and at the last minute steal the purchase money from the agents. On October 11, 1972, Nieves, accompanied by Wilson Colon, recruited William Silberberg** and his roommate, Pete Diaz, to assist in a \$160,000 robbery they were planning for the following day. In the early afternoon of that same day Artemio Rosa, a long time acquaintance of both Nieves and

* References prefixed "Tr." are to the trial transcript, which is part of the record on appeal; "GX" refers to Government's Exhibits received in evidence; "DX" refers to Defendant's Exhibits received in evidence; "CX" refers to Court Exhibits.

** The spelling in the transcript "Silverbird" or "Silverberg" is incorrect (Tr. 636, 1109).

Rivera, went to Nieves' apartment * on 7th Street in Manhattan. Nieves and Rivera were in the apartment when Rosa arrived. While in the apartment, Rosa observed a number of weapons, including two owned by the defendant Rivera: a long barreled .38 caliber revolver ** and a silver plated pearl handled small caliber automatic. Rivera had in fact brought both weapons to the apartment either on that day, October 11, or on the preceding day, October 10, 1972 (Tr. 636-637, 646-655, 906-910).

At 8 P.M. on October 11, 1972, Agents Tummillo and Hall met with the informant Salvatierra, who told them that Nieves was waiting at her apartment to sell them 10 kilograms of cocaine for \$16,000 a kilogram. The agents drove Salvatierra to her apartment, and she and Tummillo went inside. Fifteen minutes later Tummillo returned to the car and advised Hall of his conversation with Nieves. During the course of the next hour Tummillo returned to Salvatierra's apartment on two occasions to speak with Nieves. Following the last meeting Tummillo returned to the car with Nieves and Jose Marful, Salvatierra's paramour, who, unbeknownst to Nieves was an informant. Once in the car, Hall showed Nieves a "flash roll" containing \$160,000, and Nieves directed Hall to drive to 161st Street and Riverside Drive, where Nieves claimed his source for the cocaine resided.

After they arrived at 900 West 161st Street Nieves made what he claimed were two unsuccessful attempts to meet with his alleged source. Nieves then claimed he had called

* The apartment was initially rented by Rosa, but had been turned over to Nieves in early 1972 (Tr. 933-934).

** At the trial Rosa testified that Government's Exhibit 5, one of the weapons used in the shooting of Agent Tummillo and Group Supervisor Thomas Devine on October 12, 1972, was identical to the long barreled .38 caliber revolver he had earlier seen in Nieves' apartment on October 11 (Tr. 906-910).

his source and was told that the transaction would have to be postponed until the following evening (Tr. 47-54).*

On the following day, October 12, 1972, between 7:00 and 7:30 P.M., Rosa walked into a social club on 6th Street where he met the defendant Rivera and had a brief conversation with him. Some moments thereafter, while Rosa was playing the club's jukebox, Nieves and Matta came into the club and for approximately five minutes engaged Rivera in conversation. Nieves then walked over to Rosa and told him that he should leave the club because Nieves had seen Rosa's ex-wife speaking with a policeman. At Rosa's request Rivera drove Rosa uptown to 14th Street and 2nd Avenue. When Rosa got out of the car Rivera drove back downtown.** At 9:00 o'clock Nieves entered Colon's bar, La Borocca, where he met Silberberg and told Silberberg that he did not want him to participate in the robbery. Nieves then had a conversation with Colon, during which he gave Colon a pearl handled .25 caliber pistol and received in exchange a .38 caliber revolver similar to the one (GX 4) recovered after the shooting (Tr. 1113). Shortly before 9:30 Nieves and Matta were observed getting out of a taxi on West 46th Street and going to Salvatierra's apartment. At 9:30 they walked out of the apartment, accompanied by Tummillo and Marful, got into Tummillo's car and drove to the Sheraton Motor Inn on 42nd Street and 12th Avenue. All four went up to Room 1007 on the tenth floor of the Motor Inn, where Agent Hall had already checked in. Upon entering the room Hall immediately showed Nieves and Matta the money

* The Government argued that all this was done to set up Tummillo and Hall for the robbery Nieves and Rivera were planning for the next day (Tr. 47-54, 1470-1471).

** In October, 1973, while both Rivera and Rosa were being lodged at the Federal Detention Headquarters, Rivera told Rosa that after he had dropped him off at 14th Street and 2nd Avenue on the evening of October 12, 1972, he had returned to the social club on 6th Street (Tr. 910-912).

and allowed them to count it. There was \$150,000.* When they had completed counting the money, Nieves and Matta discussed with the agents various methods of exchanging the narcotics and money. It was eventually agreed that Nieves and Matta would leave the hotel, obtain the cocaine from their source and return to the hotel in approximately two hours to meet Tummillo in the bar in the lobby (GX 2A); while Nieves and Matta were picking up the cocaine, the agents would rent a second room** where the narcotics would be left by Nieves and Matta after they returned to the hotel and received the room key from Tummillo; after the narcotics had been delivered Nieves and Matta would return to room 1007 where Hall would give them the money. As Nieves and Matta were about to leave the room Hall asked them if they needed a ride. They answered they did not; that they would take a taxi. Hall then rhetorically asked: "Well, you're not going to bring 10 kilos of cocaine back in a cab?" Nieves replied, "No, we're going to get a ride." Matta then added, "Our Man". After leaving the agents' room Nieves and Matta descended to the lobby which they left via the entrance foyer.*** The surveillance agents stationed on the street outside the hotel, however, never saw them leave the building. (Tr. 891-895, 54-59, 78-80, 101-104, 637, 646-655, 84-87, 388-393, 160).

* Prior to Nieves' and Matta's arrival at the hotel Hall removed \$10,000 from the flash roll used the previous evening and gave it to another agent to hold. Hall explained that it would not have been realistic for the agents to have been able to retain the entire \$160,000 over night (Tr. 55-56).

** Rooms 1117 and 1119 (GX 2B), on the eleventh floor, were rented by the agents. Room 1119 was to be used for the exchange and Room 1117 was to be used by surveillance agents (Tr. 201-202).

*** The entrance foyer led not only to the street but also to the Motor Inn garage (GX 2A).

3. The Attempted Robbery and Shooting

Shortly after 10:00 p.m. Nieves and Matta entered the Carousel Lounge (GX 37) located on the fifth floor of the hotel, where they sat at the bar and ordered drinks. Sometime thereafter Rivera * also came into the lounge and joined them at the bar. Five minutes later all three left. At approximately 10:45 p.m. Nieves and Matta were observed getting into one of the lobby elevators adjacent to the front desk. At approximately this same time Group Supervisors Thomas Devine and Ronald Caffrey ** entered the hotel and went directly to one of the elevators. Upon reaching the tenth floor Devine and Caffrey went directly to room 1005, the surveillance room, where they met agents Sennett and Hall and an informant who, at the time, was making an undercover phone call in connection with a separate investigation (Tr. 60-62, 78-79, 185, 1034-1043, 1096, 994-1013, 1064-1091).

Shortly after he arrived in the surveillance room Devine went through the connecting door to room 1007, the undercover room (GX 2), to speak with Tummillo. At this same time Caffrey, from his vantage point in room 1005, looked into the undercover room and saw Tummillo standing by the window with his hands raised above his head. Devine was confronted by Matta, who was armed with a .38 caliber revolver (GX 5). In an effort to disarm Matta, Devine grabbed the gun and a brief struggle ensued. During the course of this struggle the connecting door slammed shut

* Marie Tomscu, the waitress on duty in the Carousel Lounge on the evening of October 12, 1972, made an in-court identification of Rivera. The identification was initially made at a hearing and then repeated before the jury. Tomscu first identified Rivera from a photographic array approximately two months before the trial (GX 35A through 35G; Tr. 994-1013, 1064-1091).

** Devine's enforcement group was conducting the negotiations with Nieves and Matta. Caffrey's group was assisting (Tr. 175-180, 187, 150).

and locked, and Devine was shot once in the left leg.* As Devine was falling to the floor Matta shot him in the back, the bullet permanently lodging in his spine.

While Matta and Devine were struggling, Tummillo drew his service automatic and fired at Matta. Tummillo's efforts to protect Devine, however, were short-lived, for almost immediately Nieves, who was also armed with a .38 caliber revolver (GX 4), shot Tummillo in the heart. As Tummillo fell to the floor Matta fired a second shot (GX 5B) into Tummillo's back.** At approximately this same time Agent Hall forced open the connecting door and engaged in a gun battle with Nieves. During the course of this exchange of fire Matta left the room by the front door, only to be confronted in the hallway by Agents Sennett and Caffrey. In a brief exchange of gun-fire Matta was killed and seconds later Nieves was also killed as he sought to escape from the room. When the shooting was over it was determined that Tummillo was dead and Devine was seriously wounded (Tr. 172-180, 98-105, 61-63, 88-90, 439-449, 457-482).

4. Rivera's Escape

Immediately after determining Tummillo's and Devine's condition, Caffrey returned to the surveillance room, picked up the flash roll and left the hotel to report the shooting to Agent Hunt. As he crossed 12th Avenue in the direction of Hunt's car, Caffrey heard from the vicinity of 42nd Street, but did not see, a car accelerating from a stop to a high rate of speed. While briefing Hunt on the shooting,

* This bullet passed through Devine's leg and was subsequently recovered at the location marked "5" on GX 2 (Tr. 467).

** Doctor Michael Baden, Deputy Chief Medical Examiner of the City of New York, who performed an autopsy on Tummillo on October 13, 1972, testified that Tummillo died of two gunshot wounds of the chest, lung, heart, stomach and spine, with internal hemorrhage (Tr. 199-200).

Caffrey stopped a New York City Police car and asked the officers to radio for assistance. A radio dispatch was made from this car at 10:53 P.M.* (Tr. 101-107, 392-394, 488-494; DX A).

At approximately 11:00 P.M., a car driven by Rivera emerged from the Brooklyn Battery Tunnel** and struck the rear of a second car being driven by Joseph Caporicci, an off-duty New York City Police Officer. When Caporicci got out of his car to inspect the damage and exchange registrations, Rivera attacked him. After a brief struggle*** which was stopped by a sergeant from the Tunnel Authority Caporicci and Rivera were directed to move their cars through the toll booths and park them by a retaining wall on the other side. However, as Rivera got into his car Caporicci ordered him to get out and told him he was under arrest. Caporicci told Mrs. Rivera that her husband would be taken to the 76th Precinct. He also instructed Mrs. Rivera to pull her car over to the retaining wall and wait. As Mrs. Rivera started to drive towards the indicated spot, Caporicci noticed the handle and cylinder of a revolver wedged between the cushions of the passenger seat. Contrary to Caporicci's instructions Mrs. Rivera did not park,

* After being advised of the shooting the officers made a U turn parking in front of the hotel. In the process they used both the car's siren and rotating beacon (Tr. 107).

** William Zipf, an engineer with the New York City Department of Highways, testified that the distance along the West Side Highway from the entrance at 42nd Street to the toll plaza of the Brooklyn Battery Tunnel was 5.8 miles. Richard Ambrose, a New York City Police Officer who had frequently been assigned to patrol duty on the West Side Highway testified that he had driven this 5.8 mile distance in four to four and a half minutes without using a siren or police lights (GX 13 and 13A; Tr. 556-573, 667-676).

*** James Infantolino, a friend of Caporicci's who had proceeded Caporicci through the toll booth and was waiting for Caporicci to follow him, saw the altercation with Rivera start. While attempting to aid Caporicci he also became embroiled in the struggle with Rivera (Tr. 792-799).

but instead fled. Following Mrs. Rivera's departure Caporicci was given four rounds of .38 caliber ammunition (GX 25) and was advised that Rivera had attempted to throw them away.* Rivera was taken to the 76th Precinct at 11:25 P.M. (Tr. 677-689, 792-799, 820-825, 855-859, 1361-1363).

Later that same evening Rivera was asked to undergo a test to determine the presence of alcohol in his blood, which he refused. He was subsequently interviewed by Caporicci and thereafter booked on charges of assault, possession of a weapon and driving while intoxicated. When Caporicci asked him about the gun in the front seat of his car, Rivera replied: "If I had a gun, I would have blown your head off" or "If I knew who you were, I would have shot you." Rivera also denied ownership of the bullets found at the toll plaza. When Caporicci asked Rivera where he had been just prior to the accident, Rivera answered that he had been at his mother's house. At the conclusion of this interview Caporicci told Mrs. Rivera, who had arrived at the stationhouse sometime shortly before 1:00 A.M., that she was also under arrest for possession of a weapon and leaving the scene of an accident. After her arrest Mrs. Rivera told Caporicci that just prior to the accident she and her husband had been parked by the water where her husband had had a few beers. Mrs. Rivera also denied that there had been a gun in the car** (Tr. 677-788, 799-804, 866-871).

* Cosmo Infantolino testified at trial that he saw Rivera throw the bullets to the ground (Tr. 822-824).

** Following their arrest Rivera and his wife told Caporicci that they lived at 192 Sands Lane, Staten Island. On the defense case, however, Mrs. Rivera admitted on cross-examination that she and her husband had an apartment at 225 Park Hill Avenue, Staten Island and that the term of occupancy had commenced on September 1, 1972. Mrs. Rivera explained that although their lease at 192 Sands Lane expired in June, 1972, they continued

[Footnote continued on following page]

Early in the morning on October 13, 1972, Artemio Rosa received a telephone call from Rivera's sister, who asked him to provide Rivera with bail money. Later in the day Rosa delivered the money to Mrs. Rivera.* The following day Rosa met Rivera on 11th Street and asked him how he had gotten the black eye and facial cuts. Rivera replied "[t]hat the Federal agents were after him in the highway and he had an accident with a police car [in] Brooklyn." He added that he had started a fight with the policeman to give his wife a chance to get away because there was a gun in the car. Rosa then asked Rivera whether he knew about Nieves and Matta. Rivera answered either that "he was very lucky he had not been killed then" or "he was very lucky he had not been killed there" (Tr. 896-898).

On three occasions, the first approximately two days after the shooting and the second approximately a week later Rivera told Hector Vigo, the manager of the Midway Bar, that he had been involved in the shooting at the Sheraton Motor Inn, that he had been waiting downstairs in the hotel for Nieves and Matta and had left when he heard the shooting. He also told Vigo that he thought the "Feds" were following him and he was going to leave the country for Puerto Rico (GX 7, 8, 9). Approximately two weeks after the shooting incident Rivera returned to the Midway Bar to borrow \$20 from Hector Vigo. During the course of this conversation he told Vigo that just prior to the shooting Nieves and Matta had counted the money, of

to reside there with relatives until the end of October, 1972, when they finally moved to the Park Hill address. In rebuttal Mary Ann Dinger testified that on June 12, 1972 she rented the Riveras an apartment on Jules Drive on Staten Island. Detective Sierp testified in rebuttal that he saw Mrs. Rivera at this apartment on June 17, 1972 (Tr. 692, 697, 1218-1221, 1327-1336, 1342-1343).

* At his sentencing on August 16, 1974 Rivera admitted that Rosa provided the bail money (Transcript, August 16, 1974, 17).

which there was \$150,000, and told him that a room was to be rented for them where the exchange would take place * (Tr. 216-336, 341-343, 507-513, 578-586, 656-662). **

In January, 1973, Special Agent Donald Ferrarone of the Drug Enforcement Administration initiated an investigation designed to ascertain whether Nieves and Matta had had the assistance of any third party in their attempt to rob Tummillo and Devine (Tr. 601-602). Approximately one month later Rivera telephoned Rosa and asked him for some more money. He told Rosa that the police were after him and he had to leave town. The following day Rosa gave Rivera \$1,000 and shortly thereafter Rivera and his wife left New York for Puerto Rico.

* The fact that a room in the hotel was to be rented for the exchange of money and cocaine was not made public until the trial (Tr. 990-993).

** At trial Hector Vigo recanted his Grand Jury testimony (GX 7). He also testified that the statements he had given to the agents concerning his conversations with Rivera and the latter's involvement with Nieves and Matta in the attempted robbery and shooting were false. He claimed that prior to testifying in the Grand Jury on June 18, 1973, Special Agent Donald Ferrarone and Detective Robert Sierp had threatened him (Tr. 216-336; GX 7, 8, 9). Ferrarone, Sierp and former Assistant United States Attorney Walter M. Phillips, Jr., denied that they, or anyone else to their knowledge, had ever threatened Vigo (Tr. 574-593, 337-384, 656-666). To establish that Vigo's recantation and denial of the truth of the statements he had made to the agents were motivated by Vigo's fear for his own life the Government called his brother, Robert Vigo, as a witness. Robert Vigo testified that in early January, 1974, while in jail on Rikers Island, he learned that some unknown individual was going to kill his brother for having testified against him. Since Hector was at the time in the Manhattan House of Detention for Men, Robert wrote a letter to Hector's wife advising her of the threat on Hector's life. In mid-January, 1974, Hector Vigo first advised the Government that he would not testify against Rivera. Two to three weeks prior to the start of Rivera's trial, Robert Vigo personally told Hector about the threat on his life (Tr. 827-853, 507-520, 350-352).

From April through June, 1973, when they returned to New York, Rivera and his wife lived at the Amapola Seaside Apartments in Isla Verde, Puerto Rico, where they registered under the assumed names of Mr. and Mrs. Ismael Monte (GX 29).^{*} During this same period of time Rivera telephoned Rosa on a number of occasions to ask for additional sums of money. As a result of these conversations Mrs. Rivera, on one occasion, returned to New York where she received \$10,000 from Rosa (Tr. 871-883, 895-903).

5. Rivera's Arrest

On September 28, 1973, Rivera and Frank Torres^{**} were arrested at 38-11 Fort Hamilton Parkway, Brooklyn, New York, by agents of the Drug Enforcement Administration. During an interview^{***} conducted later that day at the Drug Enforcement Administration Office at 57th Street, New York, New York, Rivera admitted knowing both Nieves and Matta and conceded that he had been with them early in the evening on the day of the shooting. He also acknowledged that Artemio Rosa was his partner. Rivera, however, denied any involvement in the attempted robbery and said that he could not have been involved because he had been in an accident earlier that evening and was in jail at 10:00

^{*} In addition to using a false name, the Riveras also gave a false address for their residence in New York. The address listed on the Amapola Seaside Apartments registration records (GX 29), 192 Sands Lane, Staten Island, New York, had not been the Riveras' residence for at least six months and perhaps for as long as ten months (Tr. 1126-1128, 1327-1336, 1342-1343).

^{**} Torres was arrested for harboring a fugitive. This charge was eventually dismissed on the Government's motion.

^{***} Rivera was advised of his rights in both English and Spanish (Tr. 109-112, 520-525, 593-598; GX 24). Prior to the interview Rivera was searched, and two documents, neither of which were in his name, were seized. Rivera had no identification on him in his own name (Tr. 529-534; GX 10).

P.M.* At the conclusion of the interview, but prior to being brought to the United States Courthouse for arraignment, Rivera was returned to a holding area where Torres was also being held. While in this enclosure Rivera told Torres: "It is a mistake to trust anybody. I told the wrong man." The following day Rivera made a virtually identical comment to his wife (Tr. 110-113, 520-534, 593-602).

On October 13, 1973, while being lodged at the Federal Detention Headquarters on West Street, New York, New York, in lieu of bail, Rivera attacked and beat Rosa. Later that day, in the prison's segregation area, Rivera told another inmate that he had hit Rosa because Rosa had "ratted" on him (Tr. 988-989, 903-905).

B. The Defense Case

Rivera did not testify. However, he called his wife, Blanche Rivera, his mother Isabelle Montolvo Gonzales, his niece, Lydia Pereria, his nephew, Rafael Gonzalez, David Finkelstein, David Goldman and William Silberberg as witnesses on his behalf. In addition, Rivera offered a stipulation and read to the jury the testimony of Ceferino Gordon,** a witness called by the defense at Rivera's first trial.

William Silberberg testified that Nieves, accompanied by Wilson Colon, came to his apartment on the day prior to the shooting and asked Silberberg and his partner, Pete

* Prior to Rivera's stating that he had been in jail at 10:00 P.M. on October 12, 1972 none of the agents had told him the actual time of the shooting (Tr. 110-112, 596-598).

** Gordon was not available to be called as a witness at the trial before Judge Wyatt. At Rivera's first trial Gordon, a convicted narcotic's violator, testified that he had met Rosa in West Street and had been told by him that if he testified against Rivera he would get a reduction in his 10 year sentence. On cross-examination Gordon testified that Rosa told him his sentence would be reduced to a couple of years (Tr. 1302-1307).

Diaz, to join with him in robbing \$160,000 from two individuals. Silberberg and Diaz agreed to participate in the robbery, but Colon refused. Nieves told Silberberg and Diaz that he would advise them of the time and place of the robbery. Later that same day Diaz died of an overdose of narcotics. The following day between 9:00 and 9:30 in the evening Nieves met Silberberg at Colon's bar, La Borocca, and told him that he would not allow Silberberg to participate in the robbery because Silberberg was high on both cocaine and heroin. Following this exchange, Silberberg overheard Nieves make arrangements with Colon to use Matta to assist in the robbery. Silberberg then saw Nieves hand Colon a small caliber weapon and receive a .38 caliber revolver in exchange. Finally, Silberberg testified that to his knowledge Rivera was not involved in the shooting. He stated that this opinion was based on the fact that Nieves told him the money would be split three ways, a third each for Nieves, Diaz and Silberberg. When Diaz died, he was told it would be a fifty-fifty split (Tr. 1109-1117).

On cross-examination Silberberg conceded that he had no personal knowledge of how many persons actually participated in the attempted robbery. However, he admitted that the gun Nieves had given to Colon was in fact a pearl handled silver .25 caliber automatic.* Finally, he stated that he was testifying for Rivera to put an end to the rumors in the street that he was a stool pigeon (Tr. 1117-1123).

Rivera's wife, Blanche, testified that early in the evening on October 12, 1972 she and her husband had dinner with various relatives at Rivera's mother's apartment at 612 East 11th Street in Manhattan. Shortly after supper, at

* In May, 1973, Silberberg told Agent Ferrarone that after the shooting Rivera asked Colon to return this automatic, but Colon refused (Tr. 646-647).

approximately 7:20, Mrs. Rivera and her husband's niece, Lydia Pereria, left the apartment to play Bingo at a public hall on 14th Street. Mrs. Rivera testified that she was not sure who ran the Bingo game that evening, but that it might have been either a Catholic or Jewish organization.* Mrs. Rivera also testified that after the game concluded, at approximately 10:00 or 10:15 P.M. she returned to the apartment with Lydia Pereria.** According to Mrs. Rivera, within minutes of their arrival Rivera parked in front of the building and upon joining him in the car, she noticed that he had been drinking. After refusing to permit her to drive the car, Rivera proceeded to the FDR Drive and then to the exit ramp for the Brooklyn Bridge, which was closed.*** Following a second unsuccessful attempt to enter the bridge via an approach from the city street, Rivera drove south through lower Manhattan to the Brooklyn Battery Tunnel (Tr. 1126-1139).

According to Mrs. Rivera, their car emerged from the tunnel on the Brooklyn side at approximately 10:45 P.M., and as they approached the toll booth their car side-swiped a second car being driven by Caporicci. Mrs. Rivera claimed that Caporicci got out of his car, walked over to Rivera's vehicle and asked him: "What the hell is wrong, you stupid

* On cross-examination, Mrs. Rivera admitted that she had previously testified that the bingo game on October 12, 1972, had been run by a Jewish organization. On rebuttal, the Reverend John Dwyer testified that he had run the bingo game at that hall on October 12, 1972, and that a Jewish organization had run a bingo game there the night before. Father Dwyer also testified that on October 12 the bingo game had ended at about 10:30 P.M. (Tr. 1193-1196, 1309-1318).

** Mrs. Rivera testified that it was a three to four minute walk from the Bingo hall to her mother-in-law's apartment (Tr. 1187-1188).

*** A stipulation attesting to the fact that the Brooklyn Bridge was closed at 9:00 P.M. on October 12, 1972 for resurfacing was read to the jury (Tr. 1300-1301).

mother-f...er, what are you doing? What the hell are you doing?"* Rivera then exited his car, and with in a matter of seconds became engaged in a struggle with Caporicci. At approximately this same time James Infantolino got out of Caporicci's car and joined in the altercation, which Mrs. Rivera claimed she was attempting to stop. Within seconds of Infantolino's intervention an officer from the Tunnel Authority separated the combatants and ordered them to move their cars through toll booth and park them by a retaining wall on the opposite side. Rivera and his wife got into their car, but Caporicci ordered Rivera, who was then behind the wheel, out of the car. Moments later Mrs. Rivera drove her car to the indicated area and there asked Caporicci what was to become of her husband. Caporicci told her that he would be taken to the 76th Precinct on Union Street in Brooklyn. Following this exchange, Mrs. Rivera left the toll plaza to drive to the police station ** (Tr. 1139-1153; DX. C, D).

Shortly after departing the toll plaza Mrs. Rivera testified that she became lost. However, she also testified that while driving around she inadvertently met some friends *** whom she advised of her situation and who, in turn, agreed to drive her to the stationhouse. Upon arriving at the station house, which Mrs. Rivera estimated was shortly after 11:00 P.M., Caporicci immediately asked her where she had gone, and what she had done with the gun. She replied that she had come directly to the precinct house from the

* Mrs. Rivera testified that her husband understood very little English and could not hold a conversation in that language. On cross-examination Mrs. Rivera admitted that her husband understood English curse words (Tr. 1131-1132, 1203).

** Mrs. Rivera testified that the total elapsed time from the accident until she drove away from the toll plaza was approximately five minutes (Tr. 1241-1242).

*** On cross-examination Mrs. Rivera, identified her friends as Adilade and Frank Lugo. Neither was called as a witness (Tr. 1210).

toll plaza, and knew nothing about any gun. Following this exchange Caporicci returned to the processing (booking) of Mr. Rivera. Later that evening when Caporicci attempted to locate and search Rivera's car, Mrs. Rivera told him that some friends of her's had probably taken it* (Tr. 1153-1172).

At the end of February, 1973, Rivera, his wife and their youngest child left New York for Puerto Rico. At trial Mrs. Rivera testified that they went to Puerto Rico because their child was ill, and not because they had heard the authorities were looking for her husband. From April through June, 1973, when they eventually returned to New York, they lived under the name Monte at an apartment complex known as the Amapola Seaside Apartments. Mrs. Rivera explained that Monte was an abbreviation of Montolvo her husband's mother's name,** and that Spanish speaking people customarily use, as their last name, their mother's maiden name. Furthermore, she testified that when the name was long, such as "Montolvo", they abbreviate it; so that in the instant case her husband was known in Puerto Rico as Ismael Monte.

On her direct examination Mrs. Rivera was not asked about the false New York home address which she and her husband had listed on the registration records of the Amapola Seaside Apartments (GX 29). On cross-examination, however, she explained that although she had not lived at the listed address, 192 Sands Lane, Staten Island, for at least seven months, she had nevertheless used it out of force of habit. Moreover, she also admitted on cross-examination that prior to moving to the Amapola Seaside Apartments, her family had resided for some period of time at the El

* On the Government's direct case Caporicci testified that when asked to identify her friends Mrs. Rivera refused (Tr. 696).

** Rivera's mother's full name is Isabelle Montolvo Gonzales (Tr. 1254).

San Juan Hotel. She did not recall what name they had used to register at this hotel. Finally, with respect to their stay in Puerto Rico, Mrs. Rivera testified that they had met their living expenses from her husband's gambling winnings. She denied the receipt of any moneys from Rosa* (Tr. 1173-1177-1179, 1181-1182, 1223-1234).

On June 4, 1973 the Rivera's left Puerto Rico and returned to their apartment on Staten Island. On cross-examination Mrs. Rivera was forced to admit, however, that for at least a month prior to her husband's arrest she and her husband lived with a woman by the name of Martinez on Fort Hamilton Parkway in Brooklyn.

Finally, on direct examination Mrs. Rivera acknowledged that while visiting her husband in West Street she had spoken to Rosa about her husband's case. She reported, however, that Rosa told her he had been offered a deal by the United States Attorney's office to testify against her husband, but that he would not do it because he would be convicting an innocent person. On redirect examination Mrs. Rivera testified that when the family returned from Puerto Rico she was unaware that anyone was looking for her husband (Tr. 1174, 1182-1184, 1235-1239).

Rivera's mother, Isabelle Montolvo Gonzales testified that the only things she could remember about October 12, 1972, was that her daughter-in-law, Blanche Rivera, and granddaughter, Lydia Pereria, played Bingo and returned to her apartment at 612 East 11th Street at approximately

* Rosa testified that after receiving a number of collect phone calls from Rivera in April and May, 1973, Mrs. Rivera came to New York to pick up \$10,000. Mrs. Rivera, on cross-examination, admitted coming to New York in May, 1973. She testified, however, that she came to New York from Puerto Rico for her daughter's Communion (Tr. 900-903, 1232-1234; CX 31).

10:30 P.M. Five minutes later her son arrived outside the apartment building and her daughter-in-law and granddaughter left the apartment. On cross examination Mrs. Gonzales testified that she had a good recollection of the events of the evening of October 12, 1972. She stated that the first time she saw her son that evening was when he picked up his wife at 10:30 P.M. She also admitted that her son and his wife had not had dinner at her apartment earlier that evening. When confronted with her testimony from Rivera's first trial where she testified that on October 12, 1972 she lived at 224 Avenue C and not at 612 East 11th Street, as she testified on direct examination, she denied that she had ever testified on a prior occasion for her son. When she finally acknowledged that she had, in fact, testified for him on April 11, 1974, she nevertheless denied that she had been asked a question to which she had replied that on October 12, 1972 she lived at 224 Avenue C. She explained that she now lived at 224 Avenue C but in October, 1972 had lived at 612 East 11th Street. When it was put to her that there was no such address at 224 Avenue C in New York City, she reiterated that that was her new address and that was where she currently resided (Tr. 1254-1269).

Lydia Pereria, Rivera's niece, testified that she and Blanche Rivera played Bingo on October 12, 1972, and following Bingo, at between 10:00 and 10:15 P.M., they returned to her grandmother's apartment. Shortly thereafter, Rivera arrived and was joined by his wife, both of whom then drove out of the area (Tr. 1278-1293). Rafael Gonzalez, Rivera's nephew, testified that Rivera and his wife arrived at his grandmother's apartment at between 6:20 and 6:30 in the evening on October 12, 1972. Following dinner Mrs. Rivera and Lydia Pereria went to play Bingo. At 8:15 P.M. Gonzalez and Rivera left the apartment and went to a bar where they remained together until approximately 9:00 P.M., at which time Gonzalez returned to his apartment. At 10:15 P.M. Mrs. Rivera and Lydia

also returned to the apartment where they remained for approximately five minutes; they then left and went to the street where Rivera was waiting for his wife (Tr. 1293-1299).

David Goldman and David Finkelstein, both taxi cab owners, testified that they were familiar with the condition of the West Side Highway in October, 1972, and that in their estimation it would take a minimum of twelve minutes to traverse the distance from 42nd Street in Manhattan to the toll plaza on the Brooklyn side of the Brooklyn Battery Tunnel (Tr. 1270-1278).

C. Government's Rebuttal Case

Alexander Sinclair, a supervisory officer employed by the United States Postal Service, testified that there was no such address as 224 Avenue C in Manhattan. The last time such an address existed was in 1967 (Tr. 1343-1345).

John Connolly, a police lieutenant employed by the Triborough Bridge and Tunnel Authority, testified that he was the officer in charge at the Brooklyn Battery Tunnel from 11:00 P.M. on October 12, 1972 to 7:00 A.M. on October 13, 1972. At 10:50 P.M. he conducted the roll call of the officers reporting for the 11:00 P.M. shift, and then posted the platoon. Connolly explained that this involved posting officers at duty stations inside the tunnel and that that function usually took approximately ten to twelve minutes. He estimated that he completed the posting and arrived back on the Brooklyn side of the tunnel at about 11:05 P.M. He testified that when he initiated the posting, at approximately 10:53 P.M., he did not recall having seen any accident at the toll plaza. However, when he completed the posting he observed three cars * parked by the

* These cars belonged to James Infantolino, Caporicci, and Rivera,

retaining wall on the far side of the toll booths. When he approached the cars he noticed Caporicci speaking with the driver of the third car, which shortly thereafter drove away from the toll plaza. Connolly then recounted his version of the facts surrounding the discovery of the .38 caliber ammunition (Tr. 1346-1360).

Stanley Kalenowski, a New York City Police Officer, testified that at 11:10 P.M. on October 12, 1972 he received a radio message to proceed to the Brooklyn Battery Tunnel to pick up a prisoner being held there by an off-duty police officer. After picking up the prisoner he brought him to the 76th Precinct House, where they arrived at approximately 11:30 P.M. (Tr. 1361-1366).

Special Agent Jay Silvestro was recalled as a witness and testified that he was present at Rivera's pre-arraignment interview in the United States Attorney's Office and heard Rivera advise the Assistant United States Attorney conducting the interview that he resided on East 11th Street in Manhattan and had lived at that address for two years (Tr. 1367-1373).

ARGUMENT

POINT I

The evidence was more than sufficient to establish Rivera's guilt beyond a reasonable doubt.

Rivera claims that the evidence of his guilt was insufficient. This contention is without merit. It was conceded at trial, as it had to be, that Nieves and Matta were involved in a venture to assault and rob Agents Hall and Tummillo at gunpoint, and that during the execution of their plan Nieves and Matta shot Agent Tummillo dead and seriously wounded Agent Devine. Thus, the only ques-

tion for the jury was whether Rivera was a co-venturer or aider and abettor in this assault and attempted robbery.* While, as he did at trial, Rivera attacks the reliability and accuracy of some of the Government's evidence, his arguments were rejected by the jury, and, taking the evidence most favorably to the Government, *Glasser v. United States*, 315 U.S. 60, 80 (1942), *United States v. McCarthy*, 473 F.2d 300 (2d Cir. 1972), the jury's verdict is fully supported by the record.

The events which lead to the murder of Agent Tummillo and the wounding of Agent Devine began in late September, 1972, with the attempt by Agents Tummillo and Hall to make an undercover purchase of ten kilos of cocaine for \$160,000, through Mabel Salvatierra, an informant, who sought the narcotics from Nieves. Nieves attempted to make arrangements to acquire the cocaine through Robert Vigo, and during the weeks that followed, Nieves, Matta and Ismael Rivera importuned Vigo to come up with the cocaine.

By October 11, 1972, Vigo had not procured the cocaine, and Nieves set about recruiting a team to rob the prospective purchasers of the \$160,000. Further, on the afternoon of October 11 Artemio Rosa went to Nieves' apartment and saw Nieves and Rivera with a number of weapons. Two of them were Rivera's and had been brought to Nieves' apartment by Rivera earlier that day or the day before. One was a long-barreled .38 caliber revolver, later used by Matta to shoot Agents Devine and Tummillo; the other was a pearl handled .25 caliber semi-automatic pistol

* The jury was instructed that Rivera's liability for the crimes charged could be based on a finding that he was an aider and abettor or a joint venturer in the scheme to assault and rob the agents. His liability for Agent Tummillo's murder by Nieves and Matta was based on the felony-murder rule, the felony being the attempt to rob the agents (Tr. 1552-1553).

which Nieves exchanged the next day, October 12, with Wilson Colon for the .38 caliber revolver he used later that evening to shoot Agent Tummillo. After the killings at the Sheraton Motor Inn, Rivera later sought to recover the .25 caliber automatic from Colon, but without success.

On the evening of October 11, Nieves met with Agents Hall and Tummillo and made several unsuccessful "attempts" to meet his source after being shown the \$160,000 in cash the agents had. Nieves told the agents that the transaction would be consummated on the evening the following day, October 12.

On the evening of October 12, Nieves, Matta and Rivera had a meeting at a social club on 6th Street. Later that evening, after Nieves had exchanged Rivera's .25 caliber pistol for a .38 caliber revolver at Wilson Colon's bar, he and Matta went uptown to Salvatierra's apartment, picked up Agent Tummillo, and proceeded in Tummillo's car to the Sheraton Motor Inn at 42nd Street and 12th Avenue, where Agent Hall had taken a room. After a brief meeting with Agents Hall and Tummillo and a re-examination of their money, now amounting to \$150,000, Nieves and Matta, shortly before 10 P.M., left the hotel room ostensibly to meet their "man" and pick up the 10 kilos of cocaine. In fact Nieves and Matta never left the Motor Inn. Instead they went to a lounge on the fifth floor of the Motor Inn, where, a few minutes before the shooting, they met with Rivera. At about 10:45 P.M., Nieves and Matta returned to the hotel room on the tenth floor, and the shooting followed, leaving Agent Tummillo, Matta and Nieves dead and Agent Devine gravely wounded. There was no ten kilograms of cocaine.

Moments after the shooting, Agent Caffrey heard an automobile speed away from outside the Motor Inn. Some seven minutes later, at the Brooklyn end of the Brooklyn Battery Tunnel, Rivera, accompanied by his wife, ran his

car into a car driven by an off-duty policeman, Caporicci. Rivera attacked Caporicci, who noticed a revolver wedged in the seat of Rivera's car. Mrs. Rivera, although instructed to pull the car over to a retaining wall, drove away instead. Rivera unsuccessfully attempted to dispose of some .38 caliber bullets in his possession.

Two days later, after being bailed on charges of assaulting Caporicci, possession of a weapon, and drunken driving, with money provided by his partner, Artemio Rosa, Rivera told Rosa he had been in an accident while fleeing agents and that he had started a fight to allow his wife to escape in their car because there was a gun in it. Referring to the shooting at the hotel, Rivera told Rosa that he was lucky he had not been killed there. Within two weeks of the shooting at the Sheraton Motor Inn, Rivera had told Hector Vigo in three separate conversations that he had been involved in the shooting at the Motor Inn, that prior to the shooting Nieves and Matta had counted \$150,000, that a room had been rented for the exchange of the money for the cocaine, that he had been waiting for Nieves and Matta downstairs in the Motor Inn when the shooting occurred, and that he had fled when he heard the gunfire. Rivera also told Vigo that he was going to go to Puerto Rico to avoid apprehension. Several months later, Rivera also told Rosa that he had to go to Puerto Rico to elude the police, and a short time thereafter Rivera and his family went to Puerto Rico, where they spent four months living under assumed names.

Several months after the Riveras' had returned to New York from Puerto Rico, Rivera was arrested by agents of the Drug Enforcement Agency. He admitted having been with Matta and Nieves on the evening of October 12, 1972, but claimed that he could not have been involved in the shooting because he had been in jail at 10:00 P.M. that night. In fact, he was not in jail until well over an hour after that, and no one at the questioning of Rivera had

previously suggested what time the shooting had occurred. Later on the night of his arrest, Rivera told a companion arrested with him that he had made a mistake to trust anyone and that he had told the wrong man, a remark that Rivera repeated to his wife the next day. Several weeks later, while lodged at Federal Detention Headquarters, Rivera set upon and beat up Rosa, also an inmate there, because, as Rivera told another inmate, Rosa had "ratted" on him.

Against this evidence implicating him Rivera's claim of insufficiency borders on the frivolous. Given the undisputed evidence of a scheme by Matta and Nieves to "rip off" Agents Hall and Tummillo at gun point, the evidence needed to connect Rivera to the scheme need not be substantial. Cf. *United States v. Marrapese*, 486 F.2d 918 (2d Cir. 1973), *cert. denied*, 415 U.S. 994 (1974). Here the evidence established Rivera's participation in the attempt to procure the cocaine Agents Tummillo and Hall were seeking to buy, his furnishing of the weapons used to threaten—and finally to shoot—the agents during the attempted "rip off", his meetings with Nieves and Matta twice immediately preceding the shooting, his presence in the Motor Inn, with his automobile nearby, when the shooting occurred, and his automobile accident a short distance from the scene of the shooting minutes afterwards, an accident the jury was entitled to find was brought on by his haste to get away.* This evidence is alone enough sufficient to support Rivera's conviction. See e.g., *United States v. Rizzuto*, 504 F.2d 419 (2d Cir. 1974); *United States v. D'Amato*, 493 F.2d 359, 361-365 (2d Cir. 1974), *cert. denied*, 43 U.S.L.W. 3208

* After the accident occurred, Caporicci observed a revolver in Rivera's car, and Rivera was seen attempting to dispose of some .38 caliber bullets. *United States v. Wright*, 466 F.2d 1256, 1258-1259 (2d Cir. 1972), *cert. denied*, 410 U.S. 916 (1973); *United States v. Baker*, 419 F.2d 83, 86-87 (2d Cir. 1969), *cert. denied*, 397 U.S. 976 (1970).

(October 9, 1974); *United States v. Barrera*, 486 F.2d 333 (2d Cir. 1973), *cert. denied*, 416 U.S. 940 (1974); *United States v. Pui Kan Lam*, 483 F.2d 1202, 1208 (2d Cir. 1973), *cert. denied*, 415 U.S. 984 (1974); *United States v. Wisniewski*, 478 F.2d 274, 279-280 (2d Cir. 1973); *United States v. Peichev*, 500 F.2d 917 (9th Cir. 1974). Here, however, there was substantially more evidence. In three separate conversations Rivera admitted his knowledge of and participation in the crime to Vigo, including the fact that he had been waiting downstairs in the Motor Inn for Nieves and Matta when the shootings occurred.* Moreover, the jury was entitled to infer Rivera's guilt from the evidence of (1) his flight to Puerto Rico and use of a false name, *United States v. Maliziá*, 503 F.2d 578, 582-583 (2d Cir. 1974); *United States v. Ayala*, 307 F.2d 574 (2d Cir. 1962); *United States v. Waldman*, 240 F.2d 449 (2d Cir. 1957); *Marcoux v. United States*, 405 F.2d 719 (9th Cir. 1968); (2) his false exculpatory statements, *United States v. DeAlesandro*, 361 F.2d 694, 697-698 (2d Cir.), *cert. denied*, 385 U.S. 842 (1966); *United States v. McConerny*, 329 F.2d 467, 470 (2d Cir. 1964); *United States v. Smolin*, 182 F.2d 782, 785-786 (2d Cir. 1950); and (3) his attempt to prevent Rosa, who he said had "ratted" on him, from cooperating with the Government, *United States v. Alberti*, 470 F.2d 878, 882 (2d Cir. 1972), *cert. denied*, 411 U.S. 919 (1973); *United States v. Cirillo*, 468 F.2d 1233 (2d Cir. 1972), *cert. denied*, 410 U.S. 980 (1973).

In short, the evidence of Rivera's guilt in the crimes charged was compelling and, fairly considered, overwhelming.

* When arrested in September, 1973, Rivera admitted to Drug Enforcement Administration Agents that he had been with Nieves and Matta on the night of the shooting. Cf. *United States v. Garelle*, 438 F.2d 366, 368-370 (2d Cir. 1970), *cert. dismissed*, 401 U.S. 967 (1971).

POINT II

The Trial Court's admission of a witness' prior grand jury testimony for its truth, after that witness disowned that testimony, and his allowing extrinsic proof of that same witness' motive for retracting were proper evidentiary rulings.

Rivera claims that two of the Trial Court's evidentiary rulings were reversible error: (A) the admission of a witness' grand jury testimony as affirmative evidence after that witness testified in a manner wholly contradicting that testimony; and (B) allowing extrinsic evidence of that witness' motive for changing his testimony. Both claims are completely without merit.

(A) Vigo's Grand Jury Testimony

On June 18, 1973, approximately one year prior to the trial below, Hector Vigo appeared before a Grand Jury for the Southern District of New York and testified that shortly after the October 12, 1972 shooting at the Sheraton Motor Inn the defendant Rivera admitted that he had been involved in the shooting. Specifically, Vigo testified that Rivera said that he had been waiting in a hotel for Nieves and Matta and had fled from the hotel when he heard the shooting. Rivera explained to Vigo that he believed federal agents were looking for him and he was going to go to Puerto Rico (Tr. 217-231; GX 7).

At Rivera's trial, however, Vigo, called as a Government witness, testified that he had never had any conversations with Rivera relating to the October 12, 1972 shooting. Vigo said that he lied before the grand jury because federal agents had threatened to put his wife in jail and take their children away unless he testified as they dictated. The Government, without objection, treated Vigo as a hostile witness and confronted him with his grand jury testimony.

When Vigo admitted that the grand jury transcript accurately reflected his prior testimony but claimed that it was false, the transcript was offered and received in evidence without objection (Tr. 231-237). During the charge, Judge Wyatt, again without objection, instructed the jury that Vigo's grand jury testimony, if believed, could be considered as substantive evidence on the issue of Rivera's guilt (Tr. 1555-1556, 1567).

Prior inconsistent statements of a witness made under oath before the grand jury are admissible not only for impeachment but also as affirmative evidence if the witness is available for cross-examination. *United States v. Klein*, 488 F.2d 481 (2d Cir. 1973); *United States v. Cunningham*, 446 F.2d 194, 197 (2d Cir.), cert. denied, 404 U.S. 950 (1971); *United States v. Mingoia*, 424 F.2d 710, 712-713 (2d Cir. 1970); *United States v. Insana*, 423 F.2d 1165 (2d Cir.), cert. denied, 409 U.S. 841 (1970); *United States v. DeSisto*, 329 F.2d 929 (2d Cir.), cert. denied, 377 U.S. 979 (1964). This Second Circuit rule applies "to the special problem of a witness who is called to testify to a fact and denies that fact or knowledge of it although he has testified elsewhere with respect to it." *United States v. Pfingst*, 477 F.2d 177, 198 (2d Cir.), cert. denied, 412 U.S. 941 (1973) (emphasis supplied). *United States v. Nuccio*, 373 F.2d 168, 172 (2d Cir. 1967), cert. denied, 392 U.S. 930 (1968). In this case Vigo's express denial of the truth of his prior sworn testimony permitted its admission as affirmative evidence, and the Trial Court's charge to that effect properly followed the rule in this Circuit. *United States v. Klein*, *supra*, 488 F.2d at 483; *United States v. Mingoia*, *supra*; *United States v. Borelli*, 336 F.2d 376, 391 n. 11 (2d Cir. 1964), cert. denied, 379 U.S. 960 (1965).

Moreover, since Rivera did not object either to the admission of Vigo's Grand Jury testimony or to the Trial Court's instructions, he is foreclosed from raising the issue on appeal. *United States v. Indiviglio*, 352 F.2d 276 (2d

Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966); *United States v. Pinto*, 503 F.2d 718, 723 (2d Cir. 1974). Indeed, even if an objection had been both timely made and well taken, reversal would not be appropriate given the weight of the other evidence against Rivera. See *United States v. Pacelli*, 470 F.2d 67, 69-70 (2d Cir. 1972), *cert. denied*, 410 U.S. 983 (1973).

(B) Evidence of Bias

Rivera also contends that the Trial Judge erred in allowing the Government to introduce extrinsic evidence of Vigo's motive for retracting his grand jury testimony.

The only evidence, apart from Vigo's own testimony,* offered to explain his recantation, was that given by his brother, Robert Vigo. Robert testified that in the beginning of January, 1974, he received information that his brother was going to be killed because he had testified against an unnamed individual. At the time Robert Vigo was in jail on Riker's Island, and Hector Vigo was incarcerated in the Manhattan House of Detention for Men. Accordingly, Robert wrote to Hector's wife and advised her of the threat. Robert Vigo also testified that three weeks prior to the start of the trial, he personally told Hector to be careful because he was going to get killed.

* Vigo admitted that when he first advised the Government that he would not testify against Rivera, he explained his reasons as being twofold; first, that he did not want to be a "rat", and second, that he did not believe the Government could protect him. Vigo also conceded that when his wife first discovered that he was cooperating with the Government she had asked him why he was doing this while she was all alone in the street. Finally, Vigo acknowledged that his wife had told him that she had been approached by two men who had inquired in a threatening manner about his having testified, and that thereafter both Vigo and his wife advised the Government that he would not testify (Tr. 276-285).

At the conclusion of Robert's direct testimony Judge Wyatt instructed the jury that there was no evidence linking Rivera with this threat, and that, in any event, Robert's testimony was received solely for the purpose of determining Hector Vigo's state of mind at the time he testified before the Court (Tr. 833-839).

Whether the receipt of such a threat be characterized as showing "bias" or "corruption", or "interest" it was plainly relevant to show Hector Vigo's motive for recanting his prior grand jury testimony, and the Trial Court had discretion to admit extrinsic proof of it in the form of Robert Vigo's testimony about Hector Vigo's motive to testify falsely. *United States v. Briggs*, 457 F.2d 908, 910-911 (2d Cir.), *cert. denied*, 409 U.S. 986 (1972); see *United States v. Lester*, 248 F.2d 329, 334-335 (2d Cir. 1957); III A Wigmore, Evidence § 948 (Chadbourn rev. 1970); McCormick, Evidence § 40 at 81 (2d ed., 1972). Moreover, quite apart from showing Hector Vigo's reason for disowning his Grand Jury testimony, the evidence that he had been threatened was properly admitted to rebut Vigo's volunteered statements during his trial testimony that his Grand Jury testimony was perjury suborned by Government agents by threats against his wife and children. *United States v. Graham*, 102 F.2d 436, 441-442 (2d Cir.), *cert. denied*, 307 U.S. 643 (1939).

Rivera also overstates the prejudicial impact of Robert Vigo's testimony. Judge Wyatt specifically instructed the jury that there was no evidence linking Rivera with the threat. In any event, testimony of a far more prejudicial nature than that here at issue has been held admissible when it was relevant to establish the bias or motive of a witness. In *United States v. Briggs, supra*, this Court held it was proper for an agent-witness to testify that the run-coat informant, despite his denials on the witness stand, had advised the agent that on two occasions the defendant had threatened his life unless he testified in an exculpatory manner, which the informant did. See also *United States v. Malizia, supra*; *United States v. Cirillo*, 468 F.2d

1233 (2d Cir. 1972), *cert. denied*, 410 U.S. 989 (1973); *United States v. Berger*, 433 F.2d 680, 683-684 (2d Cir. 1970), *cert. denied*, 401 U.S. 362 (1971); *United States v. Franzese*, 392 F.2d 954, 960-961 (2d Cir. 1968); *United States v. Scandiffa*, 390 F.2d 244, 254 (2d Cir. 1968), *vacated on other grounds*, 394 U.S. 310 (1969). The prejudice to the defendant in *Briggs* was obviously greater than in this case because there the evidence showed that it was the defendant who had threatened to take the turncoat informant's life if he did not testify favorably. Nevertheless Judge Friendly wrote:

"No doubt this evidence was prejudicial to Briggs in the sense that if the jury believed the agent, the evidence would tend strongly towards conviction. But it was also highly probative on the credit to be given the turncoat informant. This is not the kind of prejudice against which the law of evidence can or should protect." 457 F.2d at 911.

POINT III

Rivera's remaining contentions are without merit.

A. CX 8

Rivera's contention that during its deliberations the jury was improperly permitted to examine exhibits not in evidence is without merit for two reasons. First, no exhibits, whether in evidence or merely marked for identification were ever given to the jury during its deliberations (Tr. 1569-1574). Second, the Court Clerk's list of exhibits (CX 8), furnished at the jury's requests, contained nothing which could possibly be construed as being prejudicial to appellant. While it is true that the list included exhibits marked only for identification, it is equally true that during the testimonial phase of the trial the jury had seen these exhibits identified and marked, and had heard exten-

sive testimony with respect to each. The list did nothing more than merely identify in a general way the exhibit marked for identification. There was no description of the matter contained in the exhibit. Under these circumstances it is impossible to envision any prejudice, and Rivera points to none, suffered by him as a consequence of the jury's examining the list of exhibits *United States v. Burket*, 480 F.2d 568, 570-571 (2d Cir. 1973).

B. Artemio Rosa, a/k/a "Ardemeo Gonzalez"

Rivera's final contention is that the Government, contrary to "the spirit" of *Brady v. Maryland*, 373 U.S. 83 (1963), failed to disclose that Ardemeo Gonzalez, referred to in one report of investigation * as a possible co-conspirator in the Tummillo murder, and Artemio Rosa, a Government witness, may be one and the same person. If this is so, Rivera claims that the Government failed to disclose that fact and thus deprived him of the opportunity to make the additional argument to the jury that Rosa testified to avoid prosecution for Tummillo's death. Rivera's contentions are without merit.

Rivera has never properly raised this claim. His contention that he was unaware until after trial that Ardemeo Gonzalez "might" be the same man as Artemio Rosa ** was

* The document relied on by Rivera (DX B) was the first report filed by Agent Ferrarone and the only one in which he referred to anyone other than Rivera as being a possible suspect in the Tummillo killing (Tr. 606-609). This report was furnished to Rivera as 3500 material at the first trial in April, 1974 (Transcript, April 8, 1974, 486-490; DX B), and was introduced in evidence by Rivera at both trials.

** While Rivera seeks to make a mystery of whether "Gonzalez" and Rosa are the same man, the fact, which the Government never attempted to conceal and believed Rivera knew, is that they are.

presented in an oral statement by counsel to Judge Wyatt at the sentencing proceeding. The manner in which this knowledge was recently acquired and the ignorance of Rivera and his counsel of "Gonzalez'" identity until after trial has never been put in an affidavit (Transcript, August 16, 1974, 13-14). The failure to tender such a supporting affidavit is quite understandable in light of Rivera's own statements made at the time of sentence. Responding to Judge Wyatt's invitation to address the Court, Rivera clearly indicated that he at least knew all along that Rosa and "Gonzalez" were one and the same person. Referring specifically to Rosa, Rivera stated: "and the federal agents were looking for him . . .," adding, with reference to DX B, "and according to the *charges* it was him who they were looking for . . ." (Emphasis added) (Transcript, August 16, 1974, 16-17). Moreover, Rivera's counsel's cross-examination of Rosa at both trials unquestionably establishes that counsel knew that Rosa was at one time thought to be a possible co-conspirator in the Tummillo killing. At the trial below Rosa was asked: "As a matter of fact, weren't the Federal agents questioning you concerning your possible involvement in the shooting on October 12? Yes or No." (Tr. 915). During the first trial before Judge Knapp, Rivera asked Rosa: "Were you involved in this shooting on October 12, 1972 with Nieves and Matta?" (Transcript, April 9, 1974, 594). Moreover, since DX B was the only report which made reference to anyone other than Rivera as being a possible suspect in Tummillo's murder, it is clear that the foundation for these questions had to be Rivera's knowledge that the person identified as Gonzalez in the exhibit and the witness Rosa were one and the same person.

Rivera's lawyer's recent disclaimer of knowledge of Rosa's alias is made even more untenable in light of the close relationship between Rivera and Rosa for over two years. For some period of time prior to the October 12, 1972 shooting and continuing until June, 1973, when Rosa

was arrested, he and Rivera had been partners in the narcotics business. The facts concerning this partnership were fully developed by Rivera's counsel at Rivera's first trial and were conceded by Rivera to be true * (Transcripts, April 9 and 15, 1974, 600, 1054).

In addition to Rivera's personal knowledge, his own witness William Silberberg also made clear that the names Rosa and "Gonzalez" referred to the same person. In a report of an interview with Agent Ferrarone, a copy of which was furnished to Rivera in April, 1974 (GX 3529), Silberberg referred to Rosa by the name "Gonzalez" in explaining the Rosa-Rivera partnership. However, when questioned by the defense at trial about that interview with Ferrarone, Silberberg referred to Rosa as Rosa and not as "Gonzalez" (Tr. 1109-1110). In short, the information supplied by the Government in the context of the trial testimony given at Rivera's first and second trials clearly indicated that Gonzalez and Rosa were one and the same person.

In light of the foregoing, Rivera's contention amounts to no more than a claim that the Government failed to provide him with information which he already knew or had every reason to know based on the information provided. In this context *Prady* imposes no duty on the Government. *Williams v. United States*, 503 F.2d 995, 998 (2d Cir. 1974); *United States v. Ruggiero*, 472 F.2d 599 604 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973).

Finally, whether or not Rivera knew that "Gonzalez" was Rosa, the Government would hardly have been re-

* The close relationship between Rosa and Rivera was confirmed at Rivera's sentencing when, among other things, Rivera admitted that Rosa provided the bail money to obtain Rivera's release from jail following Rivera's arrest by Caporicci on October 12, 1972 (Transcript, August 16, 1974, 16-17).

quired under *Brady* to furnish the information that Rosa had been the subject of informant information early in the investigation linking him to the shooting at the Motor Inn, although it did furnish it. While the Government is required to furnish information which is materially impeaching of a Government witness, *Giglio v. United States*, 405 U.S. 150 (1972), the informant's vague and speculative information about Rosa's involvement—an involvement not otherwise suggested during the course of the investigation—can hardly be said to have been the kind of information the Government has a duty to disclose, *Moore v. Illinois*, 403 U.S. 786, 794-796 (1972), or to have been material to Rosa's otherwise heavily attacked credibility (Tr. 917-922, 1419-1425, 1456-1457). *United States v. Gugliaro*, 501 F.2d 68, 72-74 (2d Cir. 1974). Moreover, contrary to his claim now, Rivera did argue to the jury that Rosa's testimony should not be believed because Rosa was involved in the killing "up to his eyebrows" (Tr. 1421).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
*United States Attorney for the
 Southern District of New York,
 Attorney for the United States
 of America.*

EUGENE F. BANNIGAN,
 RUDOLPH W. GIULIANI,
 JOHN D. GORDAN, III,
*Assistant United States Attorneys,
 Of Counsel.*

AFFIDAVIT OF MAILING

State of New York)
County of New York) ss.:

EUGENE F. BANNIGAN, being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District
of New York.

Two copies on the 8th day of January, 1975
he served ~~copy~~ of the within Brief
by placing the same in a properly postpaid franked
envelope addressed:

Preminger, Meyer & Light, Esqs.
66 Court Street
Brooklyn, N.Y. 11201

And deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Sworn to before me this

EUGENE F. BANNIGAN

8th day of January, 1975.

LAURENCE S. FELD
Notary Public State of New York
No. 01-020352
Qualified in New York County
Commission Expires March 30, 1970